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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 150

HARRY F. BERGGREN & SONS, INC., Petitioner
V.
NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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V.
NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Harry F. Berggren & Sons, Inc., prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Eighth Circuit entered in the referenced proceeding on February 25, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, pp. 17-31) is reported at 406 F. 2d 239. The Decision and order of the National Labor Relations Board (App. B, infra) are reported at 165 N.L.R.B. No. 52. The Trial Examiner's Decision which the Board affirmed is attached as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals

was entered on February 25, 1969 (App. D, infra) The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1), and Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 60 At. 136, 73 Stat. 519, 29 U.S.C. Sec. 160 (e).

QUESTIONS PRESENTED

The questions presented are as follows:

(1) Whether the Court below, contrary to decisions in other Circuits and to prior decisions in the Eighth Circuit, erroneously affirmed the decision of the N.L.R.B. that a poll of employee sentiment as to uniform representation, taken in completely noncoercive circumstances, violated Sec. 8(a)(1) of the National Labor Relations Act, 29 U.S.C. Section 158(a)(1), merely because the employer, at the time of the poll, did not give express affirmative assurances, by utterances, spoken or written, that no reprisals would be effected.

(2) Whether the Court below erred in determining, contrary to previous decisions in the Eighth Circuit and in other Circuits, that alleged discharges were to discourage union membership, even though the record is devoid of any evidence that the alleged dischargees had participated in any union activity, or that the claimed discharges had or would have the effect of discouraging any union activity or union membership.

STATUTES INVOLVED

Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Section 158(a)(3) and (1), provide in pertinent part as follows:

> Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in exercise of the rights guaranteed in Section 7; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *.

Being relevant to Section 8(a)(1), Section 7 of the Act, 29 U.S.C. 157, reads:

> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

Section 8(c) of the Act, 29 U.S.C. Section 158(c), provides, in pertinent part, as follows:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Section 10(e) of the Act, 29 U.S.C. Section 160(e), provides in pertinent part as follows:

> (e) The Board shall have power to petition any court of appeals of the United States, * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

STATEMENT OF THE CASE

The petitioner, Harry F. Berggren and Sons, Inc., is a Nebraska corporation with its principal place of business at Scottsbluff, Nebraska, and is engaged in the business of the paving of roads. During the calendar year preceding the filing of the complaint involved, it purchased materials for use in the conduct of its business, valued in excess of $50,000.00, directly from sources located outside the State of Nebraska, and performed services valued in excess of $50,000.00 outside of Nebraska. The petitioner is engaged in commerce within the meaning of the Act.

The labor union involved, Laborer's Local Union 880, affiliated with the Laborer's International Union of North America, AFL-CIO, is a labor union within the meaning of the Act.

The N.L.R.B. order, which was enforced by the Court below, found that the petitioner violated Sec. 8(a)(1) of the Act, by having a minister conduct a private secret ballot election on his premises on or about August 15, 1966, one or two weeks after a representative of Local 880 of the Laborers' International Union of North America delivered a union contract to Mr. Jerry Berggren, president of the petitioner. Mr. Berggren, having no knowledge of union activities, sought the services of Reverend Clyde E. Whitney to conduct a secret ballot election to determine whether his employees wished to be represented by a union organization.

Before the balloting began, Mr. Berggren made a few remarks to the group of assembled employees. There is a contradiction in the transcript as to the contents of his speech. Reverend Whitney relates the content of the speech as follows:

> "Yes, yes, he gave a little talk, the history of the founding of the company, which I knew from local stories of how his father started with a drag line during the depression and he talked about, he said, 'I don't think anybody would have a right to do anything contrary to a man just because he belonged to a different church, a different club or anybody have a right to do these things. We are a small company and I like to feel any time you are dissatisfied, you can come to me. I can see where that would not be true in a big company like General Motors or somebody like that, but that is not the question at hand. The question is, do you men want to be represeneted by a union or don't you.' And then I think he flattered me a little at the end when he said, 'I think this will be an honest election because Father Whitney will be running it.' So that was about the sum and substance of what he said. He did rehash somewhat the history of the company, but these things are contractors' business; they go in one ear and out the other. I didn't think too much about that" (Tr. 13 & 14).

Joseph Perez, Jr., a Board witness, purportedly remembers the content of the speech as follows:

> "* * * that the air line strike would take two to three years to make up what they have lost in the strike. He also said to us his company has never been picketed nor lost a day's work. He also said it would be a hard time for us to strike, to do something like this because of payments and then he told us he was going to conduct an election to see whether his employees wanted to be represented by the union."

Following this speech, Mr. Berggren left the premises and Father Whitney conducted the election. Election judges were selected from the employees, employees counted the ballots, and the form and results of the election were notarized.

As a result of this poll, at which 7 out of 30-some employees voted for union representation, and the Union charged petitioner with violating Section 8(a)(1) of the Act.

Thereafter, in October 1966 the General Counsel sent an NLRB agent out to investigate. The Board prepared settlement agreements for the employer to sign, stating that no further action would be taken if it would not interfere with the rights of employees by engaging in such polls "as he had done in the past." The employer refused to sign the agreement.

Thereafter on December 15, 1966, five months after the election, and after the investigation and settlement offer, the Union filed charges against the petitioner alleging that it had committed 8(a)(3) violations by dismissing six (6) employees on or about August 29, 1966, 4½ months previously, because of their membership or activities in behalf of the Union. Although the union representative lived in the town in question, and supposedly a thorough investigation had been made of the case by the Board, no one questioned this August separation of six men until December 15, 1966.

The Court below also affirmed the Board's finding that discriminatory discharges were effected. The alleged violation of Section 8(a)(3) involves six (6) workers, only two of whom had worked for the company as much as two months. They all left their place of employment while working on a cement paving and guttering crew on Saturday, August 27, 1966. The practice of the company was to continue work through Saturday afternoon; on the day in question these 6 employees in question left the job at 12:10 p.m. One of the employees, Isidro Rodriguez, stated in the morning: "I am quitting this afternoon."

And then later another, Tony Lopez, said: "We are, too." At the time these men left, there was a great deal more work to do; 300 feet of concrete had been dumped in forms and needed to be finished soon. The foreman told the named two men: "Well, I can't hold you, that's your business." Then he and two remaining laborers did the necessary work and worked until 5:00 or 5:30 that evening. Mr. Berggren was told of the six men walking off the job. The following Monday morning five of the six men reported for work; because they had walked off the job the previous Saturday, leaving their tools scattered around, they were not put back to work. The sixth man did not return.

The Board found that the polling violated the Act merely because no oral or written assurance against reprisal was given at the time of the polling. It also found that the alleged discharges were violative of the Act and ordered reinstatement with backpay.

The Court below ordered enforcement of the Board's order on both issues, with Judge Blackmun dissenting on the polling issue.

REASONS FOR GRANTING THE WRIT

I.

The Majority Opinion in the Court Below, as Shown By the Dissenting Opinion, Placed Form Over Substance in Concluding That the Polling of Employees Was Unlawful Merely Because Actual Utterance of Words of Assurance, Spoken or Written, of no Reprisals Was Not Given Where the Polling Was Completely Uncoercive and Assurances Against Reprisals Were Inherent in the Factual Circumstances.

Petitioner's position with regard to the polling issue is

best summarized in the dissent of Judge Blackmun in the Court below, which reads, in pertinent part, as follows:

> "Certainly the actual utterance of words of assurance, spoken or written, but hollow, would be no genuine assurance at all, and, just as certainly, ought not then to satisfy the third requirement. In contrast, I feel that the satisfaction of the assurance requirement is to be found in the totality of the circumstances. The four other requirements of Struksnes, the majority holds, are all clearly satisfied here. I agree. However, with those four requirements so satisfied; with the poll fairly and carefully conducted; with the person in sole charge of that poll a man who was concededly neutral, who was well respected in the community, and (as he testified for the general counsel) who knew most of the employees by name; with Mr. Berggren not a member of Mr. Whitney's parish; with three employees selected by Mr. Whitney distributing and counting the ballots; and with the poll taken with no management or supervisory personnel present, I am convinced, as was one member of the Board's panel, that assurances against reprisal are inherent and present in the very situation. To require, as a condition of avoiding being guilty of an unfair labor practice, that Mr. Berggren or Mr. Whitney specifically announce, in so many words, that the employees are then and there assured that there will be no reprisals, is for me somewhat unrealistic. NRLB v. Heck's Inc., 387 F. 2d 65 (4 Cir. 1967), the case primarily urged upon us by the Board on this issue, provides no factual precedent. It appears from that opinon, that the poll there was conducted by company representatives and that the answers were given to company interrogators."

The majority opinion in the Court below held against the petitioner on the polling issue solely because of its finding that no express spoken or written assurances against reprisals were given at the time of the balloting,

and its view that this constituted a violation of the requirements of *Struksnes Construction Co.*, 165 N.L.R.B. No. 102, (1967). It is clear from the discussion of the majority, at pages 6, 7 and 8 of its opinion that this was the sole basis for its decision on this issue.

As pointed out in the dissenting opinion of Judge Blackmun, the majority places form over substance and effects an unduly stringent and formal application of this *Struksnes* requirement, assuming it is to be the law with regard to polling of employees. As Judge Blackmun points out, express utterances of words of assurance against reprisal, spoken without sincere meaning, would be no genuine assurance at all. On the other hand, the polling can, as was the case here, be conducted in circumstances so free of coercion, that assurances against reprisal are inherent in the very circumstances surrounding the polling.

The majority decision in the Court below is in conflict with the decisions of several Circuits in which it has been held that polling of employees is not unlawful unless it interferes with the employees' free choice under the circumstances at the time. The test is whether, under all circumstances, the polling or interrogation reasonably tends to restrain or interfere with employees in the exercise of rights guaranteed to them by the Act. This was the law prior to the *Struksnes* decision, *supra*, and is still the law. All that case purported to do, was to establish guidelines for use in determining the basic question. It should also be noted that *Struksnes* is only a Board decision and has not received the approval of this Court, nor any widespread approval of the Courts of Appeals. In any event, it should not be interpreted, as it was by the majority in the Court below so as to conflict with the well established body of law holding that if, under the circumstances

as a whole, the Board failed to prove interference with the employees in the exercise of their guaranteed rights, no violation has been committed.

There are many Circuit Court decisions which have emphasized viewing the totality of the circumstances, to determine whether or not polling employees as to whether or not they desire to be represented by a union, is not improper, unless the Board has shown that the polling interferes with the employee's free choice and reasonably tends to restrain or interfere with their exercise of rights guaranteed by the Act. These cases also clearly establish that the burden is at all times on the Board's General Counsel to prove restraint or interference and that the same cannot and should not be presumed, nor should a finding of restraint or interference be based upon surmise or conjecture. The many cases holding to this effect include *N.L.R.B. v. C. L. Frank, Inc.*, 351 F. 2d 35 (7 Cir. 1965); *N.L.R.B. v. Crystal Laundry & Dry Cleaning Co.*, 308 F. 2d 626 (6 Cir. 1962); *Burke Golf Equipment Corp. v. N.L.R.B.*, 284 F. 2d 943 (6 Cir. 1960); *N.L.R.B. v. Lorben Corp.*, 345 F. 2d 346 (2 Cir. 1965); *N.L.R.B. v. Roberts Brothers*, 225 F. 2d 58 (9 Cir. 1955); *Cone Bros. Contracting Co. v. N.L.R.B.*, 235 F. 2d 37 (5 Cir. 1956).

The majority decision is contrary to the prior decision of the Eighth Circuit in *N.L.R.B. v. Protein Blenders*, 215 F. 2d 749 (8 Cir. 1954). There the Court held that the circumstances as a whole did not show restraint or interference. In the instant case they have found polling to be a violation even though there is no finding nor evidence to support a finding that there was any restraint or interference.

The majority decision is contrary to that Court's deci-

sion in *Acme Products v. N.L.R.B.*, 389 F. 2d 104 (8 Cir. 1968), decided after *Struksnes*, in which it was said that:

> "Interrogation is a form of speech. We have no doubt that under appropriate circumstances, interrogation can be coercive and violative of the Act. In our present case, there is no substantial evidence of any coercive interrogation or speech on the part of the employer. No threats of reprisal or promises of reward were made. Nothing was said or asked which could reasonably be interpreted as hostile to union activity. Nothing said goes beyond the right of free speech guaranteed by § 8(c). See Dierks Forests, Inc. v. N.L.R.B., supra; N.L.R.B. v. Howard Quarries, Inc., 8 Cir., 362 F. 2d 236, 240, 62 LRRM 2512."

In the instant case there was no substantial evidence of any coercive atmosphere or of any restraint or interference. The majority does not even contend that there was.

The reasonableness of the views of the dissenting members of the Court below and the Board are supported by the fact that the majority decisions of those tribunals are in conflict with the decision of the Court in *N.L.R.B. v. Larry Paul Oldsmobile Co.*, 316 F. 2d 595 (7 Cir. 1963), where it was held that the employer's attempt to determine the validity of a union's claim to represent employees was lawful even though unaccompanied by assurances to employees that they would suffer no reprisals.

II.

The Court's Enforcement of the Board's Order Concerning Discharge Represents Departure by the Court from Prior Decisions by the Eighth Circuit and From Numerous Decisions by Other Courts that Alleged Discharges Will not be Found to be Unlawful Unless the Board Has Shown by Substantial Evidence that Claimed Dis-

charge Interfered with the Employees' Rights to Engage in Concerted Activity Protected by the Act.

It should first be noted that the involved employees quit and were not fired. Even if it is determined that they were fired, the evidence clearly shows that they were not put back to work, after they walked off the job, for justifiable reasons and not because of any union activity. Here there certainly was a proper employer motive to dismiss these employees. It was a well recognized company policy to work all day on Saturdays at least until 4:30 P.M. On the day in question the employees involved walked off the job at noon leaving 300 feet of cement finishing behind and their tools scattered all over the block.

In *N.L.R.B. v. Steel Industries, Inc.*, 325 F. 2d 173 (7 Cir. 1963) the Court recognized an employer's right to refuse to put up with employees walking off their jobs in the middle of a shift.

Certainly there was valid reason for the dismissal of these men, but that does not end the inquiry. These men were paid as if they had quit in keeping with prior precedent and practice. The record establishes a company policy to pay men, who are fired, immediately; whereas men who quit are paid at the normal pay period (Tr. 101). These men were paid at the end of the regular pay period.

Whether they quit or were dismissed, without substantial evidence of Union activity being the cause of dismissal, the Board has not sustained its burden of proof.

In *Associated Press v. N.L.R.B.*, 301 U. S. 103 (1937), this Court held:

> "* * * the Act permits a discharge for any reason other than Union activities or agitation for collective bargaining."

Furthermore, in *Fort Smith Broadcasting Company v. N. L.R.B.*, 341 F. 2d 874, 879 (8 Cir. 1965), the Eighth Circuit Court of Appeals held:

> "An employer has the right to discharge an employee for good reason, bad reason, or no reason, absent discrimination."

It has also been well established that:

> "* * * the inference that an employee was discharged because of his Union activity, must be based upon evidence, direct or circumstantial, not upon mere surmise or speculation." See *Osceola Co. Co-op. Creamery Assoc. v. N.L.R.B.*, 251 F. 2d 62, 69 (8 Cir. 1958).

Substantial evidence is needed and:

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See *N.L.R.B. v. Columbian Enamelling and Stamping Co.*, 306 U. S. 292 (1938).

One of the primary areas of deficiency in the Board's proof and one of the primary reasons why the Board erred in finding the discharges unlawful, and why the Court below erred in ordering enforcement of the Board's order with respect to the discharge issue, is the fact that there is not a scintilla of evidence, much less any substantial evidence, to show that the involved employees had ever participated in any union activity, or that, even if they had, such activity was known by the employer at any time, primarily at the time of the claimed discharges.

In 51A C. J. S., Labor Relations, Sec. 363, it is said:

> "In order for a discharge to be discriminatory as based on union activity, an employer must have knowledge of the union activity of the employee before discharging him. Knowledge of the employer is similarly an essential element of unfair labor practice in discharging an employee for other concerted activity protected by the statute. * * *"

Holding to this effect is *N.L.R.B. v. Atlanta Coca-Cola Bottling Co.*, 293 F. 2d 300 (5 Cir. 1961); and *N.L.R.B. v. Office Towell Supply Co.*, 201 F. 2d 838 (2 Cir. 1953).

To establish a discriminatory discharge of an employee for engaging in union organization or other protected concerted activity, the Board must show by substantial evidence that the employer knew that the employee was so engaged. *N.L.R.B. v. Whitin Machine Works*, 204 F. 2d 883 (1 Cir. 1953). The employer is under no duty to determine whether a given employee engaged in concerted activities prior to the discharge. *N.L.R.B. v. Westinghouse Electric Corp.*, 179 F. 2d 507 (6 Cir. 1949).

Where the Board, as here, relies on circumstantial evidence, such evidence, for the Board to prevail, must do more than give rise to a mere suspicion, it is not sufficient if the "proof" is based on surmise. *N.L.R.B. v. Shen-Valley Meat Packers, Inc.*, 211 F. 2d 289 (4 Cir. 1954). Even if these employees were engaged in union activity at the time of the claimed discharge and there is no showing they were, such is not substantial evidence of discharge for engaging in union activities. See *N.L.R.B. v. Citizen News Co.*, 134 F. 2d 962 (9 Cir. 1943).

The General Council also has the burden of proving affirmatively, by substantial evidence that there was discrimination violative of the LMRA. In these cases it is

not up to the defendant to prove "non-discrimination." See *Indiana Metal Products v. N.L.R.B.*, 202 F. 2d 613 (7 Cir. 1953) and *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.*, 217 F. 2d 366 (9 Cir. 1954).

In *Portable Electric Tools, Inc. v. N.L.R.B.*, 309 F. 2d 423, 426-7 (7 Cir. 1962), it was held that unless the Board shows affirmatively that a discharge was discriminatory and motivated by union activities, there is no violation. The Court noted the absence of "independent evidence" that the employee was engaged in union activity and that the company knew of it. Negative evidence cannot supply proof to justify the Board's finding of a violation. The Court noted that the Board argued the discriminatory nature of the discharge as if the burden was on the employer to exonerate itself of the burden of the charge made against it. It said that, on the contrary, the burden is on the Board to show affirmatively, by substantial evidence, that the discharge was discriminatory and motivated by the alleged union activities. In the instant case the Board and the Court below have emphasized what they believe the company should have done or shown and didn't, implying that the company should show nondiscrimination.

Indiana Metal Products Corp. v. N.L.R.B., 202 F. 2d 613 (7 Cir. 1953) holds that it is lawful for an employer to discharge even a known union leader who has left his work station. It rejected the Board's argument piling inference on inference by which it sought to show anti-union motive. The terminations in the instant case, even if they could properly be found to be discharges, were proper where the employees left not only their work station but the job site completely, and where there is no evidence that the involved employees were union activists or that the company did anything to thwart the union's

attempt to organize employees by the involved activity. Here the Court below has permitted the Board to prevail where its case is based on circumstantial evidence, involving inferences piled on inference It is important to remember that the N.L.R.B. conducted an investigation of the 8 (a)(1) charge after the separation of these employees and found no evidence of an 8(a)(3) violation. On the contrary, it proposed settlement of the 8 (a)(1) charge which the company rejected. It was not until some five months after the alleged discharge that the charge was filed. Certainly the failure of the N.L.R.B. investigators to find an 8 (a)(3) violation after talking with employees and union representatives, and the long delay in filing the charge creates a strong inference that said charge is frivolous.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

Copies mailed to Solicitor General and General Counsel as per Certificate of Service on file.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19,241

National Labor Relations Board, Petitioner, v. Harry F. Berggren & Sons, Inc., Respondent.	On Petition for Enforcement of an Order of the National Labor Relations Board.

[January 24, 1969.]

Before BLACKMUN, GIBSON and HEANEY, Circuit Judges.

GIBSON, Circuit Judge.

The National Labor Relations Board petitions for enforcement of its order issued against Harry F. Berggren & Sons, Inc. (Company) on June 14, 1967, pursuant to § 10(e) of the National Labor Relations Act as amended, 29 U.S.C. § 160(e). The Board, in a decision reported at 165 N.L.R.B. No. 52, found that the Company violated § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by polling employees as to their union sentiments, and § 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3),(1), by discharging five employees to discourage union membership. There is no question of jurisdiction.

We hold that substantial evidence on the whole record supports the Board's findings, and enforcement of the Board's order is granted.

The Company is a Nebraska corporation with its principal place of business at Scottsbluff, Nebraska, and is engaged in general contracting consisting mainly of paving municipal streets. Laborer's Local Union 880, AFL-CIO (Union) began organizing the Company's laborers during the summer of 1966, and on July 23, the Company president Jerry Berggren was given a copy of the Union's standard agreement for the area calling for higher wages than those paid by the Company. About two weeks after receiving a copy of the agreement, Berggren made arrangements to conduct a poll of his employees, about 35 in number, to determine union sentiment. The Reverend Clyde E. Whitney, an Episcopal minister, supervised the polling, which was done by secret ballot on August 15,[1] at the Company's office. Before the balloting began, Berggren spoke to the employees.

According to Reverend Whitney, Berggren, speaking from notes, told of the founding and history of the Company; said that any dissatisfied employee could come to him; and, "The question is, do you men want to be represented by a union or don't you." Reverend Whitney recalled Berggren talked about "contractors' business", but Reverend Whitney did not pay close attention to that portion of the speech. According to employee Joseph Perez, Berggren stated that those engaged in a recent airline strike would take two to three years making up what they lost in the strike; the Company had never been picketed nor lost a day's work; it would be a hard time for the employees to strike; and that he was going to conduct an election to see whether the employees wanted to be represented by a union.

Following the speech Berggren left the premises and Reverend Whitney proceeded by selecting employees to

1. All references to dates are to 1966 unless otherwise noted.

distribute and count the ballots. The form and results of the election were notarized. After counting, the ballots were sealed inside the ballot box which was left on the premises. Only seven out of approximately 35 employees polled expressed a preference for union representation. The following day, Berggren filed a representation election petition with the Board's Regional Office.

Despite the result of the poll, the Union continued soliciting employees. From August 22-27, business representative J. D. Simmons and organizer David Bonilla distributed literature and authorization cards to nine employees who were working on a street near St. Mary's Hospital. On August 26, Bonilla was told by a Company foreman, Claude Richards, in a firm but friendly manner to get off the jobsite and confine solicitations to non-working time. During this period four employees signed authorization cards and returned them to Simmons at the site.

On Saturday, August 27, Simmons went to the St. Mary's jobsite about 11:30 a.m. and waited around Richard's pickup truck for the crew to finish work. The general practice of the Company was to continue work through Saturday afternoon, but occasionally employees were allowed to leave early when the work for the day was completed. On this Saturday, employees Joseph Perez, Pedro Rodriguez, Tiofilo Ramirez and Isidro Rodriguez testified they asked Richards for the afternoon off and Richards agreed. Tony Lopez said that he was allowed to leave early as the work for that day was going to be completed by noon and no concrete is ever delivered to the job except during the morning on Saturdays.[2]

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2. A sixth employee mentioned in the complaint, Julio Villanueva, did not appear at the Board's hearing; no evidence pertaining to his leaving early was offered.

Foreman Richards' testimony was that Isidro Rodriguez and Tony Lopez, "spokesmen for the other fellows", said they were quitting with Richards responding, "Well, I can't hold you, that's your business." The six employees then put down their tools and walked off the job. It is undisputed that the employees signed out on their timecards which were kept in Richards' pickup, and that Richards did not make any kind of notation on the timecards about the employees quitting or walking off the job, but he did initial the timecards as was the usual practice. Art Olson, the Company office manager, testified Richards called him around 1:00 p.m. and said six men had walked off the job and wanted to know if any help were available. Olson replied that to his knowledge there was not.

Richards' version is that at the time the men left there was a great amount of work remaining to be done as 300 feet of concrete had been dumped in the forms and needed finishing.[3] A total of 500 feet of concrete had been poured Saturday morning, and it had taken a crew of eight men the morning hours to finish 200 feet. Richards claimed that he and two remaining laborers finished the remaining 300 feet in about two and one-half hours that afternoon. Richards did not indicate that he made any request of the men who left to stay and help with the unfinished concrete.

When the employees who did not work Saturday afternoon reported for work on the following Monday morning, they were told they had quit on Saturday and were no longer working for the Company. Four of the men sought

3. Unfinished concrete must be troweled, edged and grooved, checked for high and low spots with water, re-edged and regrooved, broomed, and sprayed with curing compound.

to discuss their terminations with Berggren, but were not afforded an opportunity to talk with him. The employees received their final paychecks on the following Saturday, which was Company policy with regard to employees who quit, whereas discharged employees were paid within three hours of termination.

The National Labor Relations Board recently reviewed the standards applicable to determining the legality of polls.[4] In *Struksnes Construction Co.*, 165 N.L.R.B. No. 102, 65 L.R.R.M. 1385, 1386 (1967), the Board, in response to a remand from the District of Columbia Circuit, stated, "the considerations on which polling issues will be resolved by the Board in future cases:"

> "Absent unusual circumstances, the polling of employees by an employer will be violative of section 8(a)(1) of the Act unless the following safeguards

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4. The original position of the Board was that management's polling of employees violated § 8(a)(1) of the Act by interfering with employees exercising their rights under § 7 of the Act. "We again affirm the position the Board has consistently taken that Section 8(a)(1) of the Act is violated when an employer interrogates his employees concerning any aspect of union activity." **Standard-Coosa-Thatcher Company**, 85 N.L.R.B. 1358, 1359-1360 (1949). This rigid approach was rejected in holdings by various Courts of Appeals, including the Eighth Circuit. See, **N.L.R.B. v. Protein Blenders**, 215 F. 2d 749, 750 (8 Cir. 1954) and cases cited.

In **Blue Flash Express, Inc.**, 109 N.L.R.B. 591, 593 (1954), the Board overruled **Standard-Coosa-Thatcher** and the line of cases holding that interrogation **per se** is unlawful, and enunciated a new test: "[W]hether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." See, **N.L.R.B. v. Louisiana Manufacturing Company**, 374 F. 2d 696, 700 (8 Cir. 1967) and cases cited.

A revision of the **Blue Flash** test was precipitated by **International Union of Operating Engineers, Local 49, AFL-CIO v. N.L.R.B.**, 353 F. 2d 852 (D. C. Cir. 1965), where the Court called upon the Board to reconcile **Blue Flash** with its findings in **Johnnie's Poultry Co.**, 146 N.L.R.B. 770, enforcement denied 344 F. 2d 617 (8 Cir. 1965), and **Lorben Corporation**, 146 N.L.R.B. 1507, enforcement denied 345 F. 2d 346 (2 Cir. 1965).

are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere."

The Board contends that in the instant case the poll served no legitimate purpose since at the time of the poll the Union had not sought recognition, and immediately after the vote against the Union had been secured Berggren sought a Board election. The Board argues the poll was conducted against a backdrop of hostility toward the Union as evidenced by the pre-poll expression of views in opposition to unionization by Berggren; and no assurances were given that there would be no reprisals against the employees. In addition, the Board claims that knowledge gained from the poll—seven employees voted in favor of the Union—was followed by the discriminatory discharge of five suspected union supporters, a circumstance from which it could be inferred that future interrogation might be coercive.

On the record before us, the poll was conducted with integrity and served a legitimate purpose. There is no claim that the procedure utilized by Reverend Whitney in the balloting and counting was tainted by Company influence. Berggren announced the purpose of the poll was to determine whether employees favored the Union or not. It was proper for the Company, after being presented with the contract, to ascertain the strength of union sentiment among the employees.[5] The Board's contention that

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5. No representation election was pending so as to be violative of the outright proscription in **Struksnes** of taking a poll during an election campaign. As stated in **Struksnes** at 1387 of 65 L.R.R.M.:

"On the other hand a poll taken while a petition for a Board

the improper purpose of the poll is demonstrated by Berggren's asking for a Board election is not well taken, and *Serv-Air, Inc. v. N.L.R.B.*, 395 F. 2d 557 (10 Cir. 1968), cert. denied 37 U.S. L. Week 3134 (U.S. Oct. 15, 1968), cited in support, does not strengthen the Board's position. In *Serv-Air, Inc.*, the company, through its supervisors, engaged in the circulation of an election petition "* * * against a background of animus against the Union and a variety of unfair labor practices." The Court declined to "* * * permit the Company to profit by its improper actions." 564 of 395 F. 2d. Here there has been no showing of unfair labor practices at the time of the poll.

Berggren's remarks at the outset of the balloting did not create an atmosphere of coercion. Section 8(c) of the Act, 29 U.S.C. § 158(c),[6] accords management the right to free expression within certain limits. As noted in *N.L.R.B. v. Grand Foundries, Inc.*, 362 F. 2d 702, 708 (8 Cir. 1966):

> "Each side is accorded the right of persuasion and denied the use of coercion. Management may express an anti-union animus as well as the union expressing an anti-management animus, neither constituting an unfair labor practice. (Citations omitted.)
>
> "However, in discussing the issue with employees no threat of reprisal or force or promise of benefit

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election is pending does not, in our view, serve any legitimate interest of the employer that would not be better served by the forthcoming Board election. In accord with long-established Board policy, therefore, such polls will continue to be found violative of Section 8(a)(1) of the Act."

6. Section 8(c) of the Act reads:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, is such expression contains no threat of reprisal or force or promise of benefit."

may be used or applied by management.

* * *

"Inquiries to employees about their union feelings, even arguments and reasoning with employees on the merits of unions are permissible * * *."

Berggren's speech indicated that he did not favor the Union, and Company employees should consider the difficulties that would be encountered in a strike over wages. We believe Berggren did not exceed the bounds of permissible persuasion nor did he enter into the prohibited area of coercion.

The alleged discriminatory discharge of the five suspected Union supporters likewise does not point to the existence of a coercive atmosphere at the time of the polling. The alleged discharges came some two weeks after the polling and no connection, save suspicion, is shown between the events.

In sum, the poll was conducted in a non-coercive atmosphere by secret ballot for a permissive purpose, which purpose was communicated to employees. However, no assurance against reprisals were given by the Company or its representatives at the time of the balloting. The Company argues that the lack of a coercive atmosphere coupled with the secret ballot procedure suffices to satisfy this criterion of the text enumerated in *Struksnes*. We disagree.

The five "safeguards" set forth in *Struksnes* are soundly based in an attempt to balance the right of management to communicate with its employees and the employees' statutory right to be free from interference, restraint and coercion in engaging in organizational activity, As noted in *Struksnes* at 1386-1387 of 65 L.R.R.M.:

> "The requirement that the lawful purpose be communicated to the employees, along with assurance against reprisal, is designed to allay any fear of discrimination which might otherwise arise from the polling, and any tendency to interfere with employees' Section 7 rights. Secrecy of the ballot will give further assurance that reprisals cannot be taken against employees because the views of each individual will not be known. And the absence of employer unfair labor practices or other conduct creating a coercive atmosphere will serve as a further warranty to the employees that the poll does not have some unlawful object, contrary to the lawful purpose stated by the employer."

The polling of employees by management is an area that has been and continues to be closely circumscribed by the Board,[7] as interrogation by polling offers the opportunity for unlawful abuse of employees' rights under the Act. It is to counter the adverse effects that polling has on employees exercising their rights, that the Board in its expertise has fashioned the criteria set forth in *Struksnes*. The adverse effects that follow polling and reasons for the Board's long-standing concern are best stated by the dissenting Board members in *Blue Flash*. While we do not agree with the dissent that polling *per se* is an unfair labor practice, the dissent identifies the dangers that must be neutralized if employees' rights are to be protected. As stated by the dissenting Board members in *Blue Flash* at 596-597 of 109 N.L.R.B.:

> "When an employer inquires into organizational activity whether by espionage, surveillance, polling, or direct questioning, he invades the privacy in which employees are entitled to exercise the rights given them by the Act. When he questions an employee about Union organization or any concerted activities

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7. See n. 4.

> he forces the employee to take a stand on such issues whether or not the employee desires to take a position or has had full opportunity to consider the various arguments offered on the subject. * * * Moreover, employer interrogation tends to implant in the mind of the employee the apprehension that the employer is seeking information in order to affect his job security and the fear that economic reprisal will follow the questioning. * * * Interrogation thus serves as an implied threat or a warning to employees of the adverse consequences of organization and dissuades them from participating in concerted activity. It thereby undermines the bargaining agent chosen by the employees, thwarts self-organization, and frustrates employee attempts to bargain collectively."

These adverse effects can follow interrogation regardless of the employer's motive.[8] Thus, if employees' rights are not to be subject to derogation by the right of management to poll employees for a legitimate purpose, all of the safeguards enunciated in *Struksnes* should be observed.[9] Since employees in the case at bar were not given affirmative assurances that no reprisals would follow their voting in favor of the Union, the Board's finding that the Company violated § 8(a)(1) of the Act by polling employees

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8. Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 106 (1964).

9. In N.L.R.B. v. Larry-Paul Oldsmobile Co., 316 F. 2d 595 (7 Cir. 1963), interrogations of employees to ascertain whether or not they had joined the union were held not violative of the Act merely because such interrogation was not accompanied by assurances to employees they would suffer no reprisals because of the response given. The Court held at 598 of 316 F. 2d: "The failure to give such assurances * * * is one of the circumstances to be considered but not to the exclusion of all others." The case is distinguishable in that it does not deal with interrogation by systematic polling, but with three isolated instances of informal questioning. The holding is compatible with the teaching of Blue Flash ("all the circumstances"). We express no opinion on the holding in Larry Faul Oldsmobile, since we confine our holding herein to a systematic polling situation which must be compared to the test set forth in Struksnes.

as to their union sentiments must be enforced. See, *N.L.R.B. v. Heck's, Inc.*, 387 F. 2d 65 (4 Cir. 1967).

With regard to the alleged discriminatory discharge issue, the observation of this Court in *N.L.R.B. v. Twin Table & Furniture Co.*, 308 F. 2d 686 (8 Cir. 1962) is appropriate:

> "Unless a controversy between the National Labor Relations Board and an employer as to the enforceability of an order of the Board resulting from conventional proceedings before it, presents some novel or unusual problem, a detailed discussion of the facts and the law is ordinarily profitless."

The pertinent facts here may be summarized briefly. Despite the result of the poll, the Union continued in its efforts to organize Company employees. Union representatives distributed literature and authorization cards to employees working at the St. Mary's jobsite; four employees signed cards and returned them to Union representative simmons at the site. The Company foreman, Richards, was aware of the Union's activity, having been handed one of the cards and having expressed disapproval of solicitation during working hours. Company president Berggren had expressed himself as being opposed to unionization of his employees. On the Saturday in question, Simmons was at the jobsite.

The factual dispute centers on whether the employees walked off the job or had foreman Richards' permission for taking the afternoon off. The evidence supports the Board's resolution of this issue. Richards signed the employees' timecards without any notation that the employees quit or were terminated, and the employees appeared for work as usual the following Monday morning. Neither action is consistent with their having quit, and no

explanation is offered why these employees, two of whom had worked for the Company for substantial periods, would quit jobs which promised several more weeks of work, when all were unskilled laborers unlikely to find better jobs. Richards' version, that the men walked off the job with 300 feet of concrete in need of finishing, seems incredulous. Richards admittedly did not ask the men to remain and help out, a request which Richards would be expected to make if he faced such a critical situation. His claim that he and two men finished 300 feet of concrete on Saturday afternoon, whereas a crew of eight men had finished only 200 feet Saturday morning, seems somewhat strained. The Board was justified in rejecting Richards' explanation of what happened and, with it, the Company's attempted explanation for termination of the employees.

However, rejection of the Company's explanation for the discharges, without more, does not mean that the Board has fulfilled its burden of proving discriminatory discharges within the meaning of § 8(a)(3). Basic principles are well stated in *N.L.R.B. v. South Rambler Company*, 324 F. 2d 447, 449-450 (8 Cir. 1963):

> "Certainly, an employer may hire and discharge at will, so long as his action is not based on opposition to union activities. (Citations omitted.) Furthermore, an employer's general hositility to unions, without more, does not supply an unlawful motive as to a specific discharge. (Citations omitted.) An inference that a discharge of an employee was motivated by his union activity must be based upon evidence, direct or circumstantial, not upon mere suspicion." (Citations omitted.)

However, we also take cognizance of the scope of this Court's review in this type of case, and we recognize that this case does not present a unique question for deter-

mination. As aptly phrased in *N.L.R.B. v. Council Manufacturing Corporation,* 334 F. 2d 161, 164 (8 Cir. 1964):

> "But this court has also observed that coincidence in union activity and discharge renders an employer vulnerable and serves to make the discharge issue one of fact. (Citations omitted.) * * * [W]e have noted the difficulty and sensitivity of a coincidence of this kind, the choice which then confronts the trier of fact, and the necessary result that, if the fact trier's determination is supported by an adequate evidentiary basis, this court cannot retry the suit." (Citations omitted.)

On the basis of Berggren's anti-union animus, the coincidence in time between the terminations and the union activity,[10] the unusual circumstance that the employees asked for the afternoon off at a time of heightened union activity in the presence of the Union's business representative, and the employees reporting for work the following Monday, the Board was justified in finding that the Company suspected the five employees of union activity or union sympathy and discharged them in violation of § 8(a)(3) and (1) of the Act.

Enforcement granted.

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10. The Company points to a recent decision of this Court in **Broadway Motors Ford, Inc. v. N.L.R.B.**, 395 F. 2d 337 (1968), where an alleged § 8(a)(3) violation was denied enforcement, the Court quoting the well established principle that "* * * mere coincidence of an employee's union activity and the employee's discharge will not support a charge of discrimination." 340 of 395 F. 2d. The Company deems **Broadway Motors** as "extremely analogous to the occurrences of our case." A reading of the case does not support this analysis. In **Broadway Motors**, the employee admittedly had committed acts of insubordination and unbecoming conduct which had marked him for discharge long before he was linked to any union activity, and no anti-union animus of any kind was shown. The only evidence supporting discriminatory discharge was the timing of the discharge—the employee had attended a union informational meeting on a Sunday and was terminated on the following Tuesday. **Broadway Motors** is clearly distinguishable on its facts.

BLACKMUN, Circuit Judge, dissenting in part.

I am troubled by, and dissent from, the court's enforcement of that portion of the Board's order relating to a § 8(a)(1) violation in the polling of the employees. In so doing I am not to be understood as disapproving of the conditions which *Struksnes Constr. Co.*, 165 NLRB No. 102 (1967), imposes. It merely seems to me that we can view too stringently and too formally the third requirement relating to assurances against reprisal. Certainly the actual utterance of words of assurance, spoken or written, but hollow, would be no genuine assurance at all, and, just as certainly, ought not then to satisfy the third requirement. In contrast, I feel that the satisfaction of the assurance requirement is to be found in the totality of the circumstances. The four other requirements of *Struksnes*, the majority holds, are all clearly satisfied here. I agree. However, with those four requirements so satisfied; with the poll fairly and carefully conducted; with the person in sole charge of that poll a man who was concededly neutral, who was well respected in the community, and (as he testified for the general counsel) who knew most of the employees by name; with Mr. Berggren not a member of Mr. Whitney's parish; with three employees selected by Mr. Whitney distributing and counting the ballots; and with the poll taken with no management or supervisory personnel present, I am convinced, as was one member of the Board's panel, that assurances against reprisal are inherent and present in the very situation. To require, as a condition of avoiding being guilty of an unfair labor practice, that Mr. Berggren or Mr. Whitney specifically announce, in so many words, that the employees are then and there assured that there will be no reprisals, is for me somewhat unrealistic. *NLRB v. Heck's Inc.*, 387 F. 2d 65 (4 Cir. 1967), the case primarily urged upon us by the Board on this issue, provides no

factual precedent. It appears, from that opinion, that the poll there was conducted by company representatives and that the answers were given to company interrogators.

On the discharge issue I am in agreement with the majority.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

On March 22, 1967, Trial Examiner Thomas A. Ricci isued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Counsel filed cross-exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modification.[1]

We agree with the General Counsel that in accord with our recent Decision in *Bilyeu Motor Corp.*, 161 NLRB No. 93, the policies of the Act will best be effectuated if the

1. Member Zagoria would find the secret ballot poll of the employees, in all the circumstances, not violative of the Act.

Notice which Respondent is required to sign and post, and which informs the employees of their rights, how those rights were violated, and by what process they have been upheld, is expressed in ~~simple and~~ readily understandable language as set forth in the attached Appendix.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Harry F. Berggren & Sons, Inc., Scottsbluff, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Substitute the Appendix attached hereto for the Appendix set forth in the Trial Examiner's Decision.

Dated, Washington, D. C. June 14, 1967.

Gerald A. Brown, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member

(Seal) National Labor Relations Board

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

AFTER A TRIAL IN WHICH BOTH SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE AND TO KEEP OUR WORD ABOUT WHAT WE SAY IN THIS NOTICE.

We violated the law when we had you vote on the Union. We will not do this again.

Since the Board found that we violated the law when we fire Joseph Perez, Isidro Rodriguez, Pedro Rodriguez, Tiofilo Ramirez, and Tony Lopez over the Union, we will offer them their old jobs back and give them backpay. We will not fire anyone over the Union again.

You are all free to become or remain members of Laborers' Local Union No. 880, and we won't punish you in any way if you do.

Harry F. Berggren & Sons, Inc.
(Employer)

Dated ---------- By ----------
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. No other material relative to this matter shall be posted during this period.

If Employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106 (Telephone No. FRanklin 4-7000).

APPENDIX C

TRIAL EXAMINER'S DECISION

Statement of the Case

A hearing in the above-entitled consolidated proceedings was held before Thomas A. Ricci, the duly designated Trial Examiner, on January 23 and 24, 1967, at Scottsbluff, Nebraska, on separate complaints of the General Counsel against Harry F. Berggren & Sons, Inc., herein called the Respondent or the Company. The charges were filed on August 24, 1966, and December 15, 1966, and the complaints are dated October 31, 1966 and January 11, 1967, respectively. The issues are whether the Respondent violated Sections 8(a)(1) and (3) of the Act. Briefs were filed after the close of the hearing by the General Counsel and the Respondent.

Upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondent

Harry F. Berggren & Sons, Inc., is a Nebraska corporation engaged in the paving of roads, with its principal place of business at Scottsbluff, Nebraska. During the past calendar year it purchased materials for use in the conduct of its business valued in excess of $50,000 directly from sources located outside the State of Nebraska, and performed services valued in excess of $50,000 outside the State of Nebraska. I find that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to exercise jurisdiction herein.

II. The Labor Organization Involved

Laborers' Local Union 880, affiliated with Laborers' International Union of North America, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Statute.

III. The Unfair Labor Practices

This proceeding arose from an organizational compaign carried on by Laborers' Local Union 880 in the city of Scottsbluff in the summer of 1966. On July 23 Simmons, the Union's business representative, gave a copy of his standard area agreement to Mr. Jerry Berggren, president of the Company. The wage scale for laborers set out in the proposed contract is higher than the wages paid by this company to its laborers. Berggren arranged for a local minister to conduct a secret election among over 30 of his employees on August 15. It was held on the company premises, the question put to them in writing was whether they wished "to be represented by union," and the vote was 7 in favor and the rest against union representation. Berggren spoke to the employees before the election for 4 or 5 minutes. According to the uncontradicted and credited testimony of Joseph Perez, a laborer present, among other things Berggren ". . . said that the air line strike would take two to three years to make up what they had lost in the strike. He also said to us his company had never been picketed nor lost a day's work. He also said it would be a hard time for us to strike, to do something like this because of payments and then he told us he was going to conduct an election to see whether his employees wanted to be represented by the union."

The next day, August 16, the Respondent filed a representation election petition by letter with the Board's Re-

gional Office. During the week ending Saturday, August 27, the Union's agents appeared several times at one of the Company's job projects, distributing union handbills and soliciting signatures to authorization cards. That weekend six laborers in the crew of about nine who were on that particular job were discharged, according to the complaint; the Respondent contends that they quit.

The complaint alleges that the election held by the Company constituted illegal interrogation of its employees in violation of Section 8(a)(1) of the Act, and that the discharge of the six men was motivated by an intent to stop the self-organizational activities, unfair labor practices within the meaning of Section 8(a)(3). The Respondent denies the commission of any unfair labor practices.

There is a direct question of credibility to be resolved. One of the six men who ceased work for the Respondent on August 27 did not appear at the hearing. The remaining five—all named in the complaint—told a consistent story of advising the foreman on the job that they wished to have the afternoon off; the supervisor—Claude Richards—testified at odds with them.

The job at which these events occurred, involving repaving of a street near St. Mary's Hospital in the city, had been in progress 2 weeks and there was still several week's of work to be performed. It consisted of restoring the street and sidewalks with poured concrete that arrived at the site in ready mixed trucks from a cement supplier. There were eight laborers—some also doing cement finishing—in the crew under Richards at the time. Things were taking their normal course all morning, according to the testimony of Richards, until:

"A. I would say a quarter to 12. We were finished dumping and striking off the first strike-off. I would say, at 10 after 12. The boys throwed down their tools and headed for the pickup.

Q. What do you mean, headed for the pickup?

A. Well, it was, I would say, 20 or 30 feet away from where we were working because I had my radio on in case I received a message from the office or a superintendent or the president of the Company.

Q. What happened then, if anything?

A. They passed out the cards and I asked what they were doing and they said, 'We are quitting,' and I said, 'Well, what can I do, I can't hold you.' And they just walked off the job and left me there with all the tools scattered for better than a full block and this concrete unfinished."

On cross-examination Richards varied his testimony somewhat. "Isidro was the main one. He said, 'I'm quitting this afternoon.' Lopez came up and said, 'We are, too,' and that was the end of it. They were the only two who had told me they were quitting, but they all went together. They was the spokesmen for these other fellows."

Richards went on to say that of the total of 500 feet of concrete that had been poured that morning, 300 feet remained to be finished, and that to compensate for the work not performed by the six men who left, he had to work 2 to 2½ hours himself to complete it.

Of the six men involved, five returned to work the following Monday morning on schedule. Three—Tiofilo Ramirez, Isidro Rodriguez and Pedro Rodriguez—appeared directly at the same St. Mary's Hospital job. There, Tiofilo Ramirez was told by Jerry Berggren, "No use you being here; you quit Saturday." To Isidro Rodriguez and Pedro

Rodriguez, Foreman Claude Richards said: ". . . the guys who left the job Saturday afternoon, they had to go talk to Jerry." The three proceeded from the job to the Company's downtown office.

Tony Lopez went first to the Company's office in the city very early because he was sharing a ride with a new man who was first reporting for work and had to fill out a W-2 firm. In the office, it was very early, he met Foreman Richards who told him he did not know whether Lopez would be permitted to work. "You left the job Saturday afternoon." Lopez asked what did Richards mean, and the foreman answered: "I don't know. You will have to talk to Jerry Berggren." Richards and the new man left the office and Lopez waited until Berggren arrived. At this point, according to Lopez' uncontradicted testimony, Berggren said "we were discharged or off, I don't recall his exact words."

The fifth man—Joseph Perez—presented himself early that morning at a place called Gering, where, according to his testimony, he had been told the previous Thursday or Friday to report on this Monday morning. Within minutes after he started work there, where the Company had a crew performing a street sealing job, Dale Nelson, a roving superintendent, arrived and told him he was not to work "because I had walked off the job Saturday." Nelson did not testify.[1]

Notwithstanding these passing words of "discharge"

1. The last laborer who, according to Foreman Richards, was working on the St. Mary's crew on Saturday morning and quit, was Julio Villaneuva. He did not appear at the hearing, and therefore there is no evidence as to whether he ever returned to the Company. In these circumstances, I shall recommend dismissal of the complaint with respect to Villaneuva.

from the employees in reference to the Monday morning events, the Respondent rests upon the testimony of Claude Richards to support its positive defense that all of the men quit. Counsel for the Company made clear at the hearing its position is that the men were not discharged, but chose themselves to terminate their employment.[2] In any event, it is clear they all returned for work as usual the next workday, and the Respondent refused to permit them to work.

Against the testimony of Richards, must be weighed that of the employees. Perez, who has been employed for about a month, testified that at about noon on Saturday, he said to Richards: "We would like the afternoon off," and that Richards replied "It's up to you." Ramirez, 6 years an employee of the Company, said he told Richards; ". . . I had some bills to pay, that I wanted Saturday afternoon off . . . he said to make my time out and I could leave, . . . he said, 'I'll see you Monday.'" According to Isidro Rodriguez, who had worked 3 years: "I told Claude about 11 o'clock that after all the concrete was poured, I was going to take off, which I worked, I guess, about, maybe, 10 minutes, 15 minutes after 12 to get done. He said it was all right. When it was done, I went. He said it was all right." Tony Lopez had been hired 3 or 4 weeks earlier; he testified: "The job was going to be finished for that day at noon so that's when I signed my card my time card and left." He added Richards was near him and said nothing. And finally, Pedro Rodriguez, who had also been hired only 2 or 3 weeks before: "I asked him if I can go home and he said . . . 'It's up to

2. In its brief the Respondent seemingly abandoned the affirmative defense that the employees left voluntarily, and argues instead that the Respondent had a right to discharge the men. Virtually all the case precedent cited in support deals with discharges for cause.

you if you want to go home," so I filled out my card and go home." According to each of these men there was very little, if any, work to be done; no concrete is ever delivered to a job except during the morning on Saturdays. There were one or two laborers who remained and continued whatever work was left together with the foreman.

It is a normal practice on these jobs for the men to fill in their own timecards to record the hours worked; these are kept in a small pickup truck which Richards drives. In the usual way, the men went to the truck that day and filled in their time. It is also the practice that when the men have so noted their time, the foreman checks the cards for accuracy and initials each one. Richards did this that day also; he added no special notation to indicate any departure from the norm.

I credit the employees. There is simply no rational explanation of why six men should, at the same moment, simultaneously decide to abandon their employment. This was the height of the season for them, the summertime. The very project to which they were assigned had several weeks of work ahead, and they were not skilled craftsmen who could easily change jobs. Moreover, the return of each of them the very next workday at the regular hour, belies any intent to resign. Richards said that only two of the six said anything at all on Saturday; he would have it that the other four left their tools in mid-workday without saying a word. He called these two the "spokesmen" for the rest, but offered no basis that could have justified the conclusion on his part. Moreover, it is highly unlikely that Richards would not have noted something on the timecards of the men to explain what at the hearing he insisted was most unusual conduct by them. And

despite his testimony that there was much work to be done, he did not, as he himself testified, ask the men to stay and help him at least finish off the day's work if they were not going to return at all. It is virtually impossible to believe that a foreman in charge of work yet to be done would not say something in criticism to so large a group who, without explanation, walk away from a regular assignment.

Simmons, the Union's business representative, appeared at the jobsite that morning; he stood near the foreman's pickup truck while the men filled their timecards. Richards saw he was there. It may well be that, among other purposes the men had that morning, they planned to mave lunch with Simmons and talk union matters with him. In his testimony, Isidro Rodriguez said Simmons was waiting for them "to go eat our lunch, and he was going to talk to us, I guess, when we was on our own time in other words." Any intention the men had to meet with the union agent that day, rather than point to an intent to leave the Respondent's employment, instead supports their testimony of merely asking for the afternoon off. There would have been little purpose in furthering a self-organizational compaign if their working conditions as a group were no longer going to be of concern to them.

It is true that these laborers regularly worked all day Saturdays, although the foreman also said that often the work ended as early as 3 o'clock. It was also shown, however, that on occasion, although not very frequently, the men for one reason or another did request to be released Saturday afternoons, and that the Company agreed. I find that this was one such occasion, that the men did not tell Richards they were quitting their jobs, and that in fact Richards saw nothing wrong then in their leaving

early. He gave them permission. I also find that the Respondent discharged them when they arrived for work on Monday.

The complaint alleges that they were discharged to curb the organizational activities then being carried on by the Union, and I think the evidence in its totality amply supports the assertion. On August 15 the Respondent, with a copy of the Union's proposed contract in its hands and with knowledge that union wage rates would be higher than what it was paying laborers, polled the employees to check on their union sentiments. Mr. Berggren's remarks to them before the voting made clear he was opposed to having a union in his company. The employees voted heavily against the Union then. The next day the Respondent filed a representation petition with the Labor Board. Its purpose could only have been to confirm rejection of the Union though unquestionable methods and preclude another election for a year.

During the week of August 22 to 27, Simmons, assisted by David Bonilla, appeared at the St. Mary's jobsite several times and distributed union leaflets and authorization cards. Foreman Richards saw Bonilla speaking to the ployees in the street, and told him "to get off the site and talk to the men while they were off the job and not on company time." When Simmons was there, on the 24th, Richards was also present and one employee even handed him one of the cards the business representative was distributing. The next day Simmons returned and collected four cards signed by laborers. He was back again on Saturday, at about 11 o'clock, and waited near the nickup truck for the men to finish working.

There is an inescapable inference as to what really

happened. The Union persisted in its organizational campaign notwithstanding the adverse expression of opinion by the employees in the Company's election. This ran counter to the Respondent's desire and expectation. A substantial number of the laborers being so openingly solicited chanced to ask for Saturday afternoon off that same week, and, at the moment, Richards thought little of the fact. On consideration over the weekend the Respondent decided this was an occasion to rid itself of these few who seemed vulnerable to the Union's solicitations. Richards' testimony, which cannot be credited, that the men had deliberately quit, became the device for separating the men from their jobs, and weakening the Union's chance of success in a regular election which the Board might hold on the Company's petition.

I find on the record in its entirety that Respondent discharged Joseph Perez, Tiofilo Ramirez, Isidro Rodriguez, Pedro Rodriguez and Tony Lopez on August 29, 1966, for the purpose of discouraging membership in the charging union, and thereby violated Section 8(a)(3) and (1) of the Act.

The unlawful discharge of so large a number of employees so shortly after the election conducted by the Company on August 15, taints that interrogation with an illegal purpose in itself, and removes it from any protection which the Board's decision in *Blue Flash Express,* 109 NLRB 591, may be read as according isolated interrogation in other circumstances. I therefore find that by polling its employees on August 15, 1966, concerning their union desires; the Respondent coerced and restrained them in their exercise of the right to self-organization and thereby violated Section 8(a)(1) of the Statute.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set out in section III, above, occurring in connection with the operations of the Respondent set out in section I, above, have close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has committed certain unfair labor practices, I shall recommend that it be ordered to cease and desist from such conduct and to take certain affirmative action designed to dissipate its effect. The Respondent having illegally discharged five employees, it must be ordered to reinstate them to their former or equivalent positions. The Respondent must also be ordered to make these employees whole for any loss of earnings they may have suffered in consequence of the illegal discrimination against them. Backpay shall be computed in accordance with the rules proscribed by the Board in *F. W. Woolworth,* 90 NLRB 289, and *Isis Plumbing & Heating Co.,* 138 NLRB 716. In view of the nature of the unfair labor practices committed, the commission of similar and other unfair labor practices reasonably may be anticipated. I shall therefore recommend that the Respondent be ordered to cease and desist from in any manner infringing upon the rights guaranteed to its employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record, I make the following:

Conclusions of Law

1. The Respondent is an employer within the meaning

of Section 2 of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Joseph Perez, Isidro Rodriguez, Pedro Rodriguez, Tiofilo Ramirez and Tony Lopez, and by coercively interrogating its employees concerning their union attitude, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that Harry F. Berggren & Sons, Inc., Scottsbluff, Nebraska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their exercise of the right to self-organization.

(b) Coercively interrogating its employees with respect to their desires for union representation, or in any other manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Laborers' Local Union 880, affiliated with Laborers' International Union of North America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities

for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer Joseph Perez, Isidro Rodriguez, Pedro Rodriguez, Tiofilo Ramirez and Tony Lopez immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set out under "The Remedy" section of this Decision.

(b) Preserve and make available to the Board, or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(c) Post at its central place of business and office in Scottsbluff, Nebraska, copies of the notice attached hereto and marked "Appendix."[3] Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, for 60 consecutive days thereafter in

3. If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Seventeenth Region, in writing, within 20 days from the date of receipt of this Decision what steps the Respondent has taken to comply herewith.[4]

Dated at Washington, D. C. March 22, 1967.

/s/ Thomas A. Ricci
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER
OF THE
NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT discourage membership by any of our employees in LABORERS' LOCAL UNION 880, affiliated with LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, or in any other labor organization, by discharging or otherwise discriminating against employees in regard to their hire or tenure of employment, or any other term or condition of employment.

4. If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Seventeenth Region, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

WE WILL OFFER Joseph Perez, Isidro Rodriquez, Pedro Rodriquez, Tiofilo Ramirez and Tony Lopez immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and we will make them whole for any loss of pay they may have suffered as a result of the discrimination against them, in the manner described in the Trial Examiner's Decision.

WE WILL NOT coercively interrogate or poll our employees with respect to their union desires, or in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

All our employees are free to become or remain, or to refrain from becoming or remaining members of any labor organization.

Harry F. Berggren & Sons, Inc.
(Employer)

Dated ---------- By ----------
(Representative) (Title)

NOTE: We will notify the above-named employees if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Appendix

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106 (Tel. No. FR-4-5282).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 19241
HARRY F. BERGGREN & SONS, INC., Respondent.	)	

JUDGMENT

Before: Blackmun, Gibson & Heaney, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Harry F. Berggren & Sons, Inc., its officers, agents, successors, and assigns on June 14, 1967. The Court heard argument of respective counsel on October 14, 1968, and has considered the briefs and transcript of record filed in this cause. On January 24, 1969, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Eighth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Harry F. Berggren & Sons, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.